IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 748

MILTON S. MAYER, *Appellant*,

v.

DEAN RUSK, SECRETARY OF STATE, *Appellee*.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Opinion Below

The opinion of the United States District Court for the District of Columbia is unreported and is set forth in the Appendix.

Jurisdiction

(i) *Nature of the Proceeding.*

Appellant brought this action to review the refusal of the Secretary of State to act upon his application for a passport, for an injunction to restrain the Secretary of State from enforcing Section 6 of the Subversive Activities Control Act against the appellant, and to require the Secretary of State to determine the appellant's application for a passport without the imposition of a requirement that the appellant declare whether he is a member of a Com-

munist organization, and for a judgment declaring that Section 6 of the Subversive Activities Control Act is contrary to the First and Fifth Amendments to the Constitution.

The statutes upon which the action is founded are the Administrative Procedure Act, 5 U.S.C. 1009; the Declaratory Judgment Act, 28 U.S.C. 2201; Sections 11-305 and 11-306 of the District of Columbia Code; and 28 U.S.C. 2282.

(ii) *The Order Below.*

Upon a hearing of cross-motions for summary judgment, the District Court below entered an order on December 3, 1963, in which it denied appellant's request for injunctive relief and for declaratory judgment, and dismissed his complaint. Appellant's notice of appeal was filed in the District Court on December 10, 1963.

(iii) *Statute Believed to Confer Jurisdiction.*

This Court's jurisdiction over the appeal is invoked under 28 U.S.C. 1253.

(iv) *Cases Believed to Sustain the Jurisdiction.*

Aptheker and Flynn v. *Secretary of State*, No. 461, October Term, United States Supreme Court, probable jurisdiction noted December 3, 1963.

Communist Party v. *Control Board*, 367 U.S. 1, 78, 79 (1961).

Kent v. *Dulles*, 357 U.S. 116 (1958), reversing *Briehl* v. *Dulles*, 101 App. D.C. 278, 248 F. 2d 561, 575 (1958).

Speiser v. *Randall*, 357 U.S. 513 (1958).

American Communications Association v. *Douds*, 339 U.S. 382 (1950).

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Manley v. *Georgia*, 279 U.S. 1 (1928).
Williams v. *Fears*, 179 U.S. 270, 274 (1900).

(v) *Statute Involved.*

Section 6 of the Subversive Activities Control Act of 1950, 64 Stat. 993, 50 U.S.C. 785, provides:

> "Sec. 6(a). When a Communist organization as defined in paragraph (5) of section 3 of this title is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—
>
> "(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or
>
> "(2) to use or attempt to use any such passport.
>
> "(b) When an organization is registered, or there is in effect a final order of the Board requiring an organization to register, as a Communist-action organization, it shall be unlawful for any officer or employee of the United States to issue a passport to, or renew the passport of, any individual knowing or having reason to believe that such individual is a member of such organization."

(vi) *Questions Presented by the Appeal.*

1. Whether Section 6 of the Subversive Activities Control Act of 1950 is contrary to the First Amendment to the Constitution.

2. Whether Section 6 of the Subversive Activities Control Act of 1950 is contrary to the Fifth Amendment to the Constitution.

3. Whether the imposition of the requirement that the appellant execute an affidavit that he is not, and has not been within the preceding twelve months, a member of an organization required to register under Section 7 of the Subversive Activities Control Act, as a condition to the consideration of an application for a passport is contrary to the Fifth Amendment and to the First Amendment.

Statement of the Case

Appellant, a native born citizen of the United States, is a writer, lecturer, teacher, and international churchworker, who in the conduct of his profession and the practice of his religion resides both in the United States at Carmel, California, and in Europe, at Goldern, Hasliberg, B. O., Switzerland. (R. 1) During 1963 he was engaged by various publications, including the Christian Century, the Encyclopedia Britannica, Harper's Magazine, and the Progressive Magazine, to undertake certain writing assignments which require interviews, research, and study in a number of European countries. Appellant was also designated to represent the American Friends Service Committee at a Christian Peace Conference which was scheduled to be held in Prague during 1963, and he had been engaged, with his wife, to conduct a series of seminars at Haile Sellassie University at Addis Ababa, Ethiopia. (R. 2, 3)

On January 18, 1963, appellant, then abroad upon a United States passport which was due to expire on March 2, 1963, applied at the American Embassy in Bern, Switzerland, for the issuance of a new passport so that he could fulfill the various writing, religious, and teaching assignments which he had undertaken. (R. 2) He an-

swered all questions required to be answered on the face of the passport application, affirmed that he had not committed any acts of expatriation, and affirmed his allegiance to the Constitution of the United States. (R. 2) Appellant was requested to sign an additional statement which reads:

> "I am not and have not been at any time during the period of 12 full calendar months preceding the date of this application (and no other person to be included in the passport is or has been at any time during the said period) a member of any organization registered or required to register under Section 7 of the Subversive Activities Control Act of 1950, as amended. (50 U.S.C. 786)."

He declined to execute this statement and submitted to the Department of State as his reason, apart from constitutional and other legal grounds, his belief that the statement requested of him is a "test oath" and the "historic instrument of tyrannies for the reduction of free men to servility" and is "unworthy of (his) country and (his) government." (R. 2)

On March 11, 1963, at San Francisco, California, at the request of the appellee appellant executed a further application for a passport, on Form DSP-11 which contained on its face all of the declarations required of the appellant at the time of his earlier application. Appellant again answered all questions and affirmed all declarations except that which declared that he is not, and has not been, a member of an organization required to register under Section 7 of the Subversive Activities Control Act. (R. 2, 3)

On March 14, 1963, the Acting Deputy Director of the Passport Office informed appellant that the statement concerning membership in Communist organizations is re-

quired of all passport applicants pursuant to Section 6 of the Subversive Activities Control Act and requested him to submit such a statement under oath. (R. 3) Appellant declined, stating by way of response that unless he was informed that there was a reason to believe that he is a member of a proscribed organization that he be issued a passport. (R. 3)

On April 19, 1963, the Director of the Passport Office notified the appellant that no further action would be taken to process his application for a passport unless he submitted the required affidavit. (R. 3) (Exhibits A-1, A-2, A-3, A-4).

Appellant then filed an action in the United States District Court for the District of Columbia for an injunction to restrain the enforcement of Section 6 of the Subversive Activities Control Act, as it was applied to him by the Secretary of State, and for a judgment declaring that provision of the statute to be in violation of the First and Fifth Amendments to the Constitution, and for the issuance of a passport. (R. 1-5) A three judge court was convened pursuant to 28 U.S.C. 2282, 2284. (App. 11)

There being no issues of fact in dispute, cross motions for summary judgment were filed by each party supported by copies of the passport applications and relevant correspondence. (App. 11) The Court granted the motion of the Secretary of State. In an opinion by District Judge Hart, concurred in by District Judge Sirica, the lower court expressly upheld the constitutionality of Section 6 of the Subversive Activities Control Act, and the statutory authority of the Secretary of State to require as "relevant information" a declaration from the appellant that he is not a member of the Communist Party as a condition to processing his application for a passport. (Appendix 14, 16) A concurring opinion filed by Circuit Judge McGowan declares that Communist Party membership is a "relevant circumstance" in deciding the issuance of a passport; that

the procedure of requiring the appellant to state that he is not a member of the Communist Party as a condition to acting upon his application does not "clash * * * with the concept of fundamental fairness embodied in the due process clause of the Fifth Amendment" and that in the circumstances of this case "the element of deterrence (of the exercise of First Amendment freedoms) is not excessive in the constitutional sense." (Appendix 19, 20)

The Questions Are Substantial

I

Two questions are posed by this appeal—the constitutionality of the provision of the Subversive Activities Control Act which forbids the issuance of passports to members of forbidden organizations, and the propriety of requiring a noncommunist affidavit as a condition precedent to the grant of an administrative proceeding to determine an application for a passport.

This Court has determined that the first question is substantial by noting probable jurisdiction in *Aptheker v. Secretary of State*, No. 461, October Term, 1963, December 3, 1963.

There, the appellants are each persons who have been found, without challenge, to be members of the Communist Party (*ibid.* Jurisdictional Statement, pp. 4-6).

Here, the statute has been given a far greater reach. For there has been no suggestion whatever that the appellant is a member of a proscribed organization. Indeed, the Secretary of State was requested, if he had reason, to make such an allegation but chose silence. (R. 3) Cf. Section 15, Subversive Activities Control Act, 64 Stat. 1002; 50 U.S.C. 794(c), which provides criminal penalties for violation of Section 785. By its application to the appellant the statute has been invoked to bar travel not only to proved

members of the Communist Party but also to those, such as the appellant, who decline to submit themselves to test oaths.

The constitutionality of a statute, so applied, is patently a question of profound importance. It is especially so here, touching as it does in the circumstances of this case, upon the appellant's freedom of movement to pursue a lawful occupation as a writer and teacher, his freedom of speech and of association, and of his right as an international churchworker with the American Friends Service Committee to the free exercise of his religion. *Kent* v. *Dulles*, 357 U.S. 116, 125-126. *Speiser* v. *Randall*, 357 U.S. 513.

II

No less important is the question, as this Court framed the identical issue in *Speiser* v. *Randall*, *ibid.*, at 520, whether the Secretary of State "has chosen a fair method for determining" the appellant's application for a passport. This Court has had occasion to rule many times in varying situations whether the requirement of noncommunist and similar affidavits comports with the First and the Fifth Amendments. *American Communications Assn.* v. *Douds*, 339 U.S. 382 (1950); *Gerende* v. *Board of Supervisors*, 341 U.S. 56 (1951); *Garner* v. *Board of Public Works*, 341 U.S. 716 (1951); *Speiser* v. *Randall*, *supra*, 357 U.S. 513 (1958); and *Konigsberg* v. *State Bar of California*, 366 U.S. 36 (1961), but never in a case, such as the one here, which determines the bounds of the liberty of movement of a citizen of the United States. Cf. *Kent et al.* v. *Dulles*, *supra*, with *Briehl* v. *Dulles*, 101 U.S. App. D.C. 278, 248 F. 2d 561, 575 (1958).

The fact that this question has been before this Court so often in cases involving government employment, the practice of law, and the holding of office in labor unions serves to underscore its importance where so basic a right

is impinged as that of movement from one place to another, albeit, out of the United States.

Conclusion

It is therefore respectfully submitted that the Court should note jurisdiction of this appeal. *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73 (1959).

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Filed December 3, 1963. Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1034-63

MILTON S. MAYER,

v.

DEAN RUSK, SECRETARY OF STATE, WASHINGTON, D. C.

OPINION

Mr. David Carliner of Washington, D. C. with whom Mr. Jack Wasserman and Mr. Oliver Stone, both of Washington, D. C., were on the brief, for plaintiff.

Mr. Benjamin C. Flannagan, Attorney, Department of Justice, for defendant.

Before McGOWAN, *Circuit Judge*, SIRICA and HART, *District Judges*.

HART, District Judge: On June 13, 1963, upon application of the plaintiff and agreement of the Government and after motion to convene a three judge Court was granted, this Court was appointed to hear the question of the constitutional validity of Section 6 of the Subversive Activities Control Act of 1950, 64 Stat. 993, 50 U.S.C. 785, as applied to the facts of the case at bar and the question of whether, if the statute is constitutional, the Secretary of State may make the processing of an application for a new passport conditional upon either an affirmation by the applicant that he is not a member of the Communist Party of the United States of America or an explanation by the applicant of his inability to make such an affirmation.

Both parties moved for summary judgment stating that there is no genuine issue of material fact involved and the Court finds that there is no genuine issue of material fact involved.

On January 18, 1963, Mr. Milton S. Mayer, plaintiff in

this case, executed a formal application for issuance of a new passport on the application form proffered him at the American Embassy in Bern, Switzerland. He answered the following questions required to be completed on the face of the application swearing that he had not

> "since acquiring United States citizenship, been naturalized as a citizen of a foreign state; taken an oath or made an affirmation or other formal declaration of allegance to a foreign state; entered or served in the armed forces of a foreign state; accepted or performed the duties of any office, post, or employment under the government of a foreign state or political subdivision thereof; voted in a political election in a foreign state or participated in an election or plebiscite to determine the sovereignty over foreign territory; made a formal renunciation of nationality either in the United States or before a diplomatic or consular officer of the United States in a foreign state; ever sought or claimed the benefits of the nationality of any foreign state; been convicted by a court or court martial of competent jurisdiction of committing any act of treason against, or attempting by force to overthrow, or bearing arms against, the United States, or conspiring to overthrow, put down or to destroy by force, the Government of the United States; or departed from or remained outside of the jurisdiction of the United States for the purpose of evading or avoiding training and service in the military, air or naval forces of the United States; * * *."

He also declared his allegiance to the Constitution of the United States. Plaintiff refused to sign, as part of his application, a statement which read:

> "I am not and have not been at any time during the period of 12 full calendar months preceding the date of this application (and no other person to be included in the passport is or has been a member at any time during said period) a member of any organization

> registered or required to register under Section 7 of the Subversive Activities Control Act of 1950, as amended (50 U.S.C. 786)."

(NOTE: Applicant raises no question as to the 12 month provision not being authorized by statute. Applicant states his position would be the same if the words "and have not been at any time during the period of 12 full calendar months preceding the date of this application" were omitted. The Court makes no decision as to the propriety or impropriety of the 12 month provision.)

Subsequently, on March 11, 1963, at San Francisco, California, he re-executed his application for a passport on Form DSP-11, prescribed in May, 1962, which form contained the same declarations on its face as those of the Bern application. Plaintiff again answered and affirmed all of the declarations required except that relating to membership in an organization registered or required to register under Section 7 of the Subversive Activities Control Act. With regard to all declarations required on Form DSP-11 there is the following provision:

> "If any of the above mentioned acts or conditions have been performed by or apply to the applicant or to any other person to be included in the passport, the portion which applies should be struck out, and a supplementary explanatory statement under oath (or affirmation) by the person to whom the portion is applicable should be attached and made a part of this application."

Paragraph 6 of Information for Passport Applicants, printed on the back of Form DSP-11, sets forth that the only organization registered or required to register as a Communist organization under Section 7 of the Internal Security Act of 1950 is The Communist Party of the United States of America.

Plaintiff, in refusing to affirm the declaration set forth on the application form as to membership in The Com-

munist Party of the United States of America, informed the Department of State that he refused to execute this statement on the grounds that it was a "test oath" which violated his constitutional rights. It must be noted that the plaintiff did not assert that the required declaration, or the required explanatory statement if the declaration could not be made, would violate his right against self-incrimination insured by the Fifth Amendment, and therefore the question of self-incrimination is not raised.

The Department of State notified plaintiff that absent such affirmation or explanation, the application must be considered incomplete and would not be processed until such time as it is completed.

On April 20, 1963, Mr. Mayer filed this action seeking a declaratory judgment and an injunction restraining the enforcement of Section 6 of the Subversive Activities Control Act, 50 U.S.C. 784.

Before this Court Mr. Mayer claims that to refuse to process his passport application because he refused to affirm non-membership in the Communist Party denies him his liberty of travel in violation of the Constitution. He asserts that Section 6 of the Subversive Activities Control Act, upon which the requirement depends, is unconstitutional and that even if Section 6 is constitutional, making such an affirmation a condition precedent to the processing of his passport application violates due process by shifting to him the burden of proving his ability to qualify for a passport.

The question of the constitutionality of Section 6 of the Subversive Activities Control Act of 1950 has previously been raised and decided by a three-judge Court in this Circuit. In *Flynn* v. *Rusk*, Civil Action No. 3478-62 and *Aptheker* v. *Rusk*, Civil Action No. 3886-62, on July 12, 1963, a three-judge Court of this Circuit upheld the constitutionality of Section 6. This Court agrees with the decision of that Court.

It is clear that the Secretary of State has the statutory authority to refuse to process an incomplete application for a passport if the information required on the appli-

cation is proper and authorized by law. The provisions of 22 U.S.C. 213 state:

> "*Before a passport* is issued to any person by or under authority of the United States such person shall subscribe to and submit a written application duly verified by his oath . . . which said application shall contain a true recital of each and every matter of fact which may be required by law or by any rules authorized by law to be stated as a prerequisite to the issuance of a passport." (Emphasis supplied)

By State Department regulation information regarding membership in the Communist Party is required to complete the application. The non-affiliation declaration, when read in conjunction with the explanatory statement provision which immediately follows it on Form DSP-11, calls for such information. Section 51.134 of the Passport Regulation (22 C.F.R. 51.134) provides:

> "Application for passports should be made on the most recent form or forms prepared by the Department of State and should contain complete information called for in such form or forms."[1]

If the requirement is a valid one, and the information is not supplied, the application is incomplete and need not be processed.

Plaintiff concedes this, but maintains that to decline to process his application and to issue him a passport because he refuses to affirm non-membership in the Communist Party is, in effect, to conclude that he is a Communist Party member, and to restrain his liberty as if he were a member, without holding a hearing and without requiring the Government to prove by a preponderance of the evidence that applicant is a member of the Communist Party of the United States of America.

Plaintiff misstates the case. A passport has not been

[1] This regulation was issued by the Secretary of State by the authority granted him under 22 U.S.C. 211(a).

denied him because he is considered a member of the Communist Party, but because he has failed to submit a completed application. Under Section 51.134 of the Regulations, the same thing would result if he refused to answer any of the other questions set forth on the face of the applications such as whether he had become a naturalized citizen of a foreign state after acquiring United States citizenship, served in a foreign army, etc.

Mr. Mayer is an applicant for a passport and the same rules of law apply to him as to many other types of applicants. Applicants for radio licenses, marriage licenses and voting privileges must supply required data before the applicant may exercise his right. As was said by Judge Prettyman in *Briehl* v. *Dulles*, 101 U.S.App.D.C. 239 at 252, 248 F.2d 561 at 574 (1957). "There is nothing new or novel about requiring an applicant for a permit or license to supply pertinent information under oath."

The Secretary of State, in exercising his powers over the granting or withholding of passports, is entitled to relevant information. Information as to Communist Party membership is certainly relevant to the carrying out of the Secretary's duties in compliance with Section 6 of the Subversive Activities Control Act wherein Congress has directed the Secretary not to issue a passport to a present member of the Communist Party of the United States of America and has provided criminal penalties against the Secretary if he issues a passport to a person whom he knows or has reason to believe is a member of said Party.

Mr. Mayer, however, relying on *Speiser* v. *Randall*, 357 U.S. 513 (1958), argues that the affirmation in question differs from other required information in that it places the burden upon the applicant to deny the very thing that the Government must prove to refuse him a passport, i.e. membership in the Communist Party. It is true that if an applicant stated on the application that he or she was presently a member of the Communist Party, denial of a passport could result after regular processing of the application under the pertinent State Department regulations but the situation could be the same if the applicant responded affirmatively that any of the other conditions which

are valid reasons for denial of a passport applied to him. This possibility does not bring the requirement of information regarding membership in the Communist Party within the prohibition of *Speiser*. What was there condemned was an entire procedure which was designed to place the burden of proof upon the applicant at all stages of the proceedings in violation of due process, the oath required being a part of that procedure. It was held that since the procedure taken as a whole was invalid then the requirement of the oath, the first step in the invalid procedure, was bad. In the procedure provided for and followed by the Secretary of State in determining whether any applicant is a member of the Communist Party, including a hearing before an examiner and right of appeal to the Board of Passport Appeals, the burden of proof is always upon the Government.[2] This distinguishes the case at bar from *Speiser*.

Defendant's Motion for Summary Judgment is granted.

Plaintiff's Motion for Summary Judgment is denied.

Plaintiff's request for injunctive relief and for declaratory judgment is denied.

Plaintiff's Complaint is dismissed with prejudice.

SIRICA, J. concurs.

JOHN J. SIRICA, District Judge.

——— ———, *District Judge*.

December 3rd, 1963.

[2] See: Sections 51.138—51.170 Passport Regulations, 22 C.F.R. 51.138-51.170.

Filed December 3, 1963. Harry M. Hull, Clerk.

McGowan, Circuit Judge, concurring: This case unlike *Flynn* v. *Rusk*, Civil Action No. 3748-62, and *Aptheker* v. *Rusk*, Civil Action No. 3886-62, both decided July 12, 1963, does not present the question of the constitutionality of Section 6 of the Subversive Activities Control Act of 1950, 64 Stat. 993, 50 U.S.C. 785, as applied to one who is concededly a member of the Communist Party and who has been denied a passport for that reason. I, therefore, have no occasion to speak to that issue. Neither does it present the questions which would arise if the plaintiff were pressing a Fifth Amendment privilege against self-incrimination as his justification for failure to respond to all of the requests for information contained in the application form employed by the State Department.

It is enough for me that Congress has, upon the basis of detailed legislative findings as to the nature of the Communist Party, determined by statute that, at the least, the fact of present membership in the Communist Party is a relevant circumstance to be taken into account by the Secretary of State in deciding whether to issue a passport in any particular case. Whether that fact alone ends the matter, or whether the Secretary either can or should take into consideration other facts such as the degree of the individual's conscious attachment to, or active promotion of, the Party's objectives, or the purposes of the travel for which the passport is sought, are, I repeat, questions not presented by this record, because here there has been no denial of a passport but only a refusal to pursue the processing of the application because of its incompleteness.

This incompleteness is defended only on the ground of a generalized aversion in principle to what is characterized by the plaintiff as a "test oath;" and the constitutional underpinning for this position is supplied in the form of a claim of the denial of substantive constitutional rights of free speech and association under the First Amendment, and of procedural due process rights under the Fifth.

As to the latter, it is important, as Judge Hart's opinion makes clear, that the Secretary has, by regulation, fully accepted the burden of proving that the plaintiff is a member of the Communist Party upon any challenge by the Secretary of a statement in the application that he is not. *Speiser* v. *Randall*, 357 U.S. 513 (1958), is, thus, a wholly different case. If the plaintiff here chooses to complete the application form he need not apprehend that he will ever be placed under the burden of proving the truth of his representation. Rather, the burden of disproving it is explicitly the Secretary's. The procedure so provided does not impress me as clashing with the concepts of fundamental fairness embodied in the due process clause of the Fifth Amendment. Certainly it presents no traps or pitfalls which warrant one who is not a member of the Communist Party from being unwilling to say so.

With respect to the First Amendment claim, this plaintiff's relationship to the focus of the argument is somewhat obscure. As noted hereinabove, this is not a case where a passport has been denied because of Communist Party membership, nor is there any allegation that plaintiff has been, or is being, thwarted in a desire to join the Party or to propagate its doctrines because of the impact that such speech or association might have on his right to secure a passport. The record generally, and plaintiff's brief in particular, appear to me freighted with implications that plaintiff is in fact neither a member of the Party nor moved by and desire to join. Under these circumstances, there may well be a serious question as to the appropriateness of the advancement by plaintiff of this First Amendment argument. We need not make the matter turn on this point, however, although it does seem to emphasize the slenderness of the reed upon which plaintiff leans in this respect.

His argument is that his volunteering a statement as to non-membership operates generally to deter political utterance and association on his part. But clearly in the context of this record, the element of deterrence involved is not excessive in the constitutional sense. Congress has

made detailed findings as to the nature of the Communist conspiracy, the threat it presents to the American system of government, and the part that international travel can and does play in the effectuation of that conspiracy. There is, thus, a relationship between Communist Party membership and the grant of a passport which enables Congress to say, as a minimum, that the fact of membership is relevant in the Secretary of State's determination. Without endeavoring to define the outermost limits of Congressional power in this regard, nor to prescribe exactly how the statute shall be construed and applied, it can be said that a mere general distaste for stating the fact of one's political non-affiliation does not outweigh the Secretary's interest in knowing—and, indeed, his obligation to try as ascertain—whether passport applicants are Party members. The administrative magnitude of the Secretary's task in applying all of the relevant standards to the many passport requests received by him is obviously very great. Those applicants who refuse to state what the facts are carry a heavy burden of showing that they are deprived of constitutional rights when their applications are treated as incomplete. I can not say that the plaintiff here has met that burden.

CARL MCGOWAN,
Circuit Judge.

Filed December 3, 1963. Harry M. Hull, Clerk.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1034-63

MILTON S. MAYER,

v.

DEAN RUSK, Secretary of State, Washington, D.C.

ORDER

This cause having been heard on the plaintiff's motion for summary judgment, and the defendant's cross-motion for summary judgment, and the Court sitting as a three-judge statutory District Court having considered the entire record, the pleadings, affidavits, exhibits and memoranda of points and authorities filed herein, and there having been a full and complete hearing, and the Court having found that there is no genuine issue as to any material fact and that the defendant in accordance with the opinions dated December 3, 1963, is entitled to judgment as a matter of law, it is, therefore, by this Court this 3rd day of December, 1963,

ORDERED That the defendant's cross-motion for summary judgment be, and the same hereby is, granted, and it is

FURTHER ORDERED That the plaintiff's motion for summary judgment be, and the same hereby is, denied, and that the plaintiff's request for injunctive relief and for declaratory judgment be, and the same hereby is, denied, and that the plaintiff's complaint be, and the same hereby is, dismissed with prejudice.

CARL MCGOWAN,
Circuit Judge.
JOHN J. SIRICA,
District Judge.
GEORGE L. HART, JR.,
District Judge.

[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 746

MILTON S. MAYER, APPELLANT

v.

DEAN RUSK, SECRETARY OF STATE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR APPELLEE

This appeal presents two issues for review by this Court. The first is the constitutionality of Section 6 of the Subversive Activities Control Act of 1950, as amended, 64 Stat. 993, 50 U.S.C. 785. Section 6 makes it unlawful for any member of a Communist organization which has registered under the Act, or against which there is in effect a final registration order of the Subversive Activities Control Board, to apply for a passport or to use or attempt to use any passport. Section 6 also makes it unlawful for any officer or employee of the United States to issue a passport to any person who he has reason to believe is a member of such an organization. The second issue is the constitutionality of the requirement imposed by the Secretary of State that an applicant

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for a passport declare under oath that he is not a member of such an organization.

Appellant, in making application for a passport, refused to sign the declaration required by the application form that he was not then, and had not been during the preceding twelve months, a member of an organization required to register under the Subversive Activities Control Act. The Secretary of State notified the appellant that, without such a declaration or other explanation,[1] the application was incomplete and it would not be processed until it was completed. Appellant then brought the present action to have Section 6 declared unconstitutional, to enjoin its enforcement, and to have a passport issued to him. The three-judge district court, following the previous decisions of another three-judge court in the same circuit in *Flynn* v. *Rusk*, Civil Action No. 3478–62, and *Aptheker* v. *Rusk*, Civil Action No. 3886–62, upheld the constitutionality of Section 6 of the Act. It further held that since the information sought by the required declaration was relevant to determining appellant's eligibility for a passport, the declaration was authorized and the Secretary's refusal to process the incomplete application was valid. Circuit Judge McGowan filed a concurring opinion in which he stated

[1] With regard to all declarations required on the application form there is the following provision:

"If any of the above mentioned acts or conditions have been performed by or apply to the applicant or to any other person to be included in the passport, the portion which applies should be struck out, and a supplementary explanatory statement under oath (or affirmation) by the person to whom the portion is applicable should be attached and made a part of this application."

that the case did not present the question of the constitutionality of Section 6. He reasoned that Section 6, at the least, determined that membership in the Communist Party was a relevant factor in issuing passports and that it was, therefore, proper to refuse to process appellant's incomplete application.

The central issue in this case is whether Section 6 of the Subversive Activities Control Act is constitutional—*i.e.*, whether membership in a Communist organization which has registered or been ordered to register under the Act is a valid ground for denial of a passport. If such membership is a proper basis for refusing to issue a passport, it is an appropriate subject for inquiry. The Secretary of State may therefore refuse to give any further consideration to an application, such as appellant's, which fails to include such basic information. *Briehl* v. *Dulles*, 248 F. 2d 561 (C.A. D.C.), reversed on other grounds, 357 U.S. 116; see *Konigsberg* v. *State Bar*, 366 U.S. 36; *Borrow* v. *Federal Communications Commission*, 285 F. 2d 666 (C.A. D.C.), certiorari denied, 364 U.S. 892; *Cronan* v. *Federal Communications Commission*, 285 F. 2d 288 (C.A. D.C.), certiorari denied, 366 U.S. 904; *Blumenthal* v. *Federal Communications Commission*, 318 F. 2d 276 (C.A. D.C.), certiorari denied, 373 U.S. 951; *In re Anastaplo*, 3 Ill. 2d 471, 121 N.E. 2d 826, certiorari denied, 348 U.S. 946.

Appellant attempts (J.S. 8) to bring the issue concerning the Secretary's refusal to process his application within the holding of this Court in *Speiser* v. *Randall*, 357 U.S. 513. That case held that California could not deny tax exemptions for veterans on the

ground that the applicants refused to swear that they did not advocate the overthrow of the government or the support of a foreign government against the United States in the case of war. In *Konigsberg v. State Bar, supra*, 366 U.S. at 53–56, this Court—in holding that a State could deny admission to the bar of an applicant who refused to answer questions concerning membership in the Communist Party—distinguished *Speiser* on two grounds, both of which are applicable here. First, *Speiser* was explicitly limited so as to distinguish *Garner v. Board of Public Works*, 341 U.S. 716, *Gerende v. Board of Supervisors*, 341 U.S. 56, and *American Communications Assn. v. Douds*, 339 U.S. 382, where this Court upheld statutes requiring that persons swear that they did not belong to the Communist Party or other subversive organization in order to obtain various positions. *Speiser* distinguished such cases on the ground that "[t]he principal aim of those statutes was not to penalize political beliefs but to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public." Similarly, here, the purpose of the Act was not to penalize beliefs but to protect the country from internal subversion directed and supported by a foreign country. See *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 93–97.

Second, this Court held the oaths in *Speiser* unconstitutional because the statute placed the burden of proof at all stages on the applicant for a tax exemption. 366 U.S. at 53. As was found by the court below, in the passport procedure provided by the Sec-

retary of State, the burden is always upon the government (J.S. 16–17): "It is true that if an applicant stated on the application that he or she was presently a member of the Communist Party, denial of a passport could result after regular processing of the application under the pertinent State Department regulations but the situation could be the same if the applicant responded affirmatively that any of the other conditions which are valid reasons for denial of a passport applied to him. * * * In the procedure provided for and followed by the Secretary of State in determining whether any applicant is a member of the Communist Party, including a hearing before an examiner and right of appeal to the Board of Passport Appeals, the burden of proof is always upon the Government." In short, if Section 6 is constitutional, the judgment below should be affirmed.

Although we believe that the decision below is correct upon both issues, we do not urge that the issues are so frivolous as to be subject to a motion to dismiss. We do, however, oppose the motion to advance for oral argument filed in the parallel case, *Copeland v. The Secretary of State*, No. 1041 Misc., and any similar motion that may be filed in the instant case.

The question of the constitutionality of Section 6 is now before the Court in *Aptheker v. Secretary of State*, No. 461, this Term, probable jurisdiction noted, 375 U.S. 928. The appellant's brief has been filed and the case is scheduled for argument at the session beginning March 23, 1964. The appellants in *Copeland* and the instant case may file *amicus curiae* briefs if they so desire.

The issue concerning the validity of the question asked by the Secretary of State concerning the applicant's membership in the Communist Party is quite separate. The burden of meeting an accelerated briefing schedule would bear heavily upon the government during a time of year in which the preparation of government briefs in due course itself puts a heavy strain on the Office of the Solicitor General. It is important that the basic issue concerning the constitutionality of Section 6 be speedily resolved, but we see no reason why the second question, if probable jurisdiction is noted, should not be argued in its regular turn.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

FEBRUARY 1964.

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